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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-1008

SIDNEY S. HARRIS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
ALLEGHENY LUDLUM INDUSTRIES, INC., *et al.*,
and UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,

Respondents.

No. 75-1005

NATIONAL ORGANIZATION FOR
WOMEN, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
ALLEGHENY LUDLUM INDUSTRIES, INC., *et al.*,
and UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT STEEL COMPANIES

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Statutes Involved

Section 707 of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e-6 (Supp. III, 1973), is set forth in the appendix to this brief.

Statement of the Case

The present petitions present three narrow issues arising from the innovative effort of the Government, the companies* and the international union to resolve sweeping claims of employment discrimination by means of nationwide consent decrees.

On April 12, 1974, the United States** filed a complaint in the District Court for the Northern District of Alabama (Pointer, J.) against the companies and the United Steelworkers of America (the "union"). The complaint alleged a pattern or practice of discrimination in employment in violation of Section 707 of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e-6 (Supp. III, 1973), and contractual obligations under Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974). The filing of the complaint followed upon "more than six months of intensive, hard-fought negotiations" between the plaintiffs on one side and the companies and the union on the other (A. 16a***). Simultaneously with the filing of the complaint, the parties submitted for approval by the court a nationwide settlement in the form of two consent decrees constituting the most significant industry-wide Title VII settlement yet reached.****

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*The respondent steel companies ("the companies"), which comprise most of the basic steel industry, are Allegheny Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Jones & Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Wheeling-Pittsburgh Steel Corporation and Youngstown Sheet and Tube Company.

**Plaintiffs in the district court are the United States by the Attorney General, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission.

***Citations throughout are to the appendix to the Petition of Sidney S. Harris, *et al.* (the "Harris Petition").

****The consent decrees, in approximate figures, cover 73% of the basic steel industry. They apply to 250 separate plants and 350,000 employees of whom 60,000 are minority and female. Back pay

By May 17, 1974, three organizations, four individuals and six groups of 33 named plaintiffs in six pending private actions moved to intervene for the purpose of vacating the consent decrees. The district court granted intervention to a group of 36 individuals, including the Harris petitioners and the three individuals named in the petition of the National Organization for Women, Inc. (No. 75-1005, "NOW Petition"). Intervention was permitted for the limited purposes of (1) seeking to vacate or stay the consent decrees and (2) questioning the release to be used in conjunction with the back pay tenders to be made under Decree I (A. 6a). The district court denied other motions for intervention, including that filed by NOW, *qua* organization. As the court of appeals noted, however,

> "Among the thirty-six persons as to whom the [district] court allowed intervention by right . . . three were women specifically appointed by NOW at Judge Pointer's request, and represented by NOW's counsel throughout the proceedings."*

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amounting to $30,940,000.00 is offered to about 46,000 of those latter employees. Consent Decree I ("Decree I") takes the form of an injunction applicable to those units in which the terms and conditions of employment are established by national collective bargaining between the companies and the union. It provides for a restructuring of seniority rules and regulations to employ plant continuous service for determinations depending on seniority; specifies procedures respecting transfers, promotions, vacancies, layoffs and recalls; and establishes affirmative action procedures with respect to trade and craft positions, testing and other matters. Employees hired before January 1, 1968, are given a right to transfer to new departments or units with rate retention. Consent Decree II ("Decree II") takes the form of an injunction respecting those aspects of employment such as hiring, initial assignment and promotion to supervisory positions as to which the union has no responsibility.

A further, more detailed description of the decrees is found at A. 17a-23a.

*A. 27a (footnote omitted). NOW also filed a brief and presented oral argument on the merits before the court of appeals on its own behalf, as well as on behalf of three female applicants whom Judge Pointer allowed to intervene (A. 28a).

The district court, after fully hearing the intervenors and the parties, refused to vacate or stay the consent decrees and found the proposed release would be legal and valid if executed knowingly and voluntarily.* The intervenors appealed, again raising numerous objections to the validity of various procedural provisions of the decrees and the proposed release. The Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, stating that:

> "In sum, we adhere to our conclusions that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree." (A. 118-119a).

No employee is a party to the decrees, and the decrees do not seek by their terms to bind employees by way of res judicata or estoppel by judgment (A. 23a). As a condition to the receipt of back pay, however, employees are required to execute a release, described in paragraph 18(g) of Decree I,** of any claims to back pay and injunctive relief arising from pre-decree acts, practices or conduct.

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*A. 12a. The district court did not rule upon the efficacy of any particular release, finding that such questions could only be resolved upon examination of the individual factual setting in which the release was executed (A. 12a).

**The original language of paragraph 18(g) of Decree I is set forth in pertinent part at A. 54a-55a. As amended by order of the district court dated January 5, 1976, the third sentence of that paragraph now states:

> "Such release will also bar claims for additional relief of any kind, including injunctive relief and damages, based on alleged injury suffered at any time after April 12, 1974, by reason of continued effects of any such discriminatory acts which occurred on or before April 12, 1974." (A. 126a).

All affected employees have the unfettered option to accept the back pay offer provided under the decree and execute a release or to reject the back pay offer (A. 47a-48a n. 26). The injunctive relief provided by the decree extends to all affected employees regardless of whether they elect to accept the offer and execute the release (A. 47a-48a).

In examining the validity of the proposed release the court of appeals first held that a consent decree could lawfully provide for the release of claims for both monetary relief and injunctive relief arising out of continuing effects of pre-decree discrimination:

> "[I]n order to delineate more precisely the contours of the applicable rule of law, we hold that the employee may release not only claims for additional back pay, but also claims for other relief—including injunctive—provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, or the 'continuing' or 'future' effects thereof so long as such effects are causally rooted—in origin, logic, and factual experience—in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge, as described by Judge Pointer." (A. 57a).

The court, however, then analyzed the specific language of paragraph 18(g) of Decree I to mean that the release provided for would not require relinquishment of claims solely for injunctive relief based on continued effects of alleged pre-decree discrimination (A. 58a-59a).

Because that interpretation did not comport with the explicit understanding as to the scope of the release which

the parties had reached in negotiating the decree, the companies and the union moved in the district court in December 1975 to amend paragraph 18(g) to conform its language to the original intent of all parties. Evidence was submitted showing that in the negotiation of Decree I all parties understood and agreed that those who accepted back pay tenders would release *all* claims relating to alleged predecree discrimination, including claims for injunctive relief based on continuing effects of such discrimination. After notice to these petitioners and others, a hearing was held in the district court on January 2, 1976. At that hearing the plaintiffs (the Government) acknowledged on the record that the "defendants accurately characterize[d] the true agreement reached by the parties" (A. 120a-121a).

After that hearing, the district court, on January 5, 1976, considered the Harris petitioners' objections, granted the amendment* and denied intervention except for the limited purpose of filing a motion to reconsider the amendment and conducting discovery in support of such a motion. The district court also granted intervention to certain of the Harris petitioners regarding the proposed notice of rights and release, but approved that notice and the release after making certain revisions (A. 126a-127a). The Harris petitioners are presently conducting discovery in the dis-

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*The district court approved the amendment upon traditional contract principles. As stated by this Court in *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 236-37 (1975) (footnote omitted):

> "[S]ince consent decrees and orders have many attributes of ordinary contracts, they should be construed basically as contracts. . . ."

Accord, United States v. *City of Jackson*, 519 F. 2d 1147, 1151 (5th Cir. 1975) ("A consent decree is in many respects a contract between the parties thereto").

The applicable rule of law where a contract does not accurately express the agreement of the parties is stated in RESTATEMENT (SECOND) OF CONTRACTS § 297 (Tentative Draft No. 10, April 18, 1975). See A. 120a-122a for the district court's discussion of these principles.

trict court on the amendment issue. The Harris petitioners appealed the January 5 order to the Fifth Circuit and acknowledge that neither that order nor the issues decided therein are ripe for review by this Court (Harris Petitioners' Motion to Defer Consideration, ¶¶ 1-2).*

Also on January 5, 1976, the district court denied a motion to stay the back pay offer. On January 28, 1976, the Fifth Circuit denied a similar motion for a stay and a petition for mandamus. Mr. Justice Powell denied a similar motion for stay on February 19, 1976.

As of the date of filing of this brief, the back pay offer has been made, pursuant to the notice of rights and release approved by the district court, to employees at approximately 240 plants where no private actions are pending. Tender to employees at the remaining dozen plants either has been or will be made after approval of the notice and release by the district courts where those private actions are pending.

Argument

I.

THE ASSERTED PARTIAL INVALIDITY OF THE RELEASE DOES NOT WARRANT GRANTING A WRIT OF CERTIORARI.

A. No Question of Importance Is Presented.

The significance of the consent decrees as instruments for enforcement and resolution of employment discrimination disputes on an industrywide basis does not imbue the narrow question presented by the Harris and NOW petitioners with importance or timeliness sufficient to warrant consideration by this Court on certiorari.

First, even if the release were held invalid insofar as it requires giving up a right to sue for additional monetary

*The NOW petitoners took no part in the January 1976 proceedings in the district court.

or injunctive relief against continued effects of alleged pre-decree discriminatory acts, it is inconceivable that any significant number of individuals who signed the release would benefit thereby.

Both the question presented and petitioners' entire argument assume a state of facts that the court of appeals correctly characterized as an "inconceivable possibility"*—namely that the companies and the union will, in spite of the decrees, take no corrective action to eliminate the effects of pre-decree discrimination. That assumption is tenable only if one ignores the fact that the injunctive provisions of the decrees, the adequacy of which has never been challenged by the Harris petitioners (A. 52a), have been in effect for more than a year and one-half and the major changes in the industry seniority system and the initial reviews thereof have been largely completed.**

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*Referring to the release of claims for additional monetary relief, the Fifth Circuit stated:

> ". . . all an employee really waives in terms of 'continued effects' by signing a release is his or her *speculative* accrual of further damages due to the *inconceivable possibility* that the defendants would take no corrective action whatsoever subsequent to the entry of the consent decrees." (A. 60a; emphasis added).

**The Harris Petition attempts to convey by careful innuendo the impression that the companies and union are continuing admitted preexisting discrimination. Petitioners assert, in the face of an explicit denial in both decrees (A. 60a), that all the companies "maintained segregated departments" at most of their plants (Petition, p. 7). They imply, without a shred of support in the record, that the decrees have done nothing to correct that fictitious situation (*id.*, p. 8, "[u]ntil the seniority system is overhauled . . ."; "to the extent that the government is unable or unwilling to negotiate reform . . ."). They suggest, again without evidence, that there is doubt as to compliance (*id.*, p. 11, "*whether* the defendants [will be] *prompted by the consent decrees* [to] reform their seniority system . . . is . . . a matter of conjecture" (emphasis added)). In fact, the reforms required by the decrees have been in effect at all major plants since August 1974, and thousands of employees have already benefitted from the liberalized transfer provisions, use of plant service, rate retention and other corrective measures.

Moreover, petitioners' arguments depend upon the incredible assumption that the "plenary" power of the district court under its retained jurisdiction (A. 77a, 82a, 105a), the contempt power (A. 60a) and the pervasive reporting requirements and monitoring by Government agencies (A. 103a-104a) provide no incentive for compliance. Petitioners have abandoned their challenges (strenuously urged upon the court below (A. 82a-105a)), to the adequacy of the reporting provisions and the extent of the supervisory powers of the Government agencies and the district court. The assumption that a significant number of employees who signed the release will have cause to sue because defendants will not continue to comply with the decrees, is the same sort of "last-ditch" assumption soundly rejected by the court of appeals which found no evidence in the record to suggest that the parties "did not sincerely mean what they said" (A. 105a).*

Second, the question presented does not warrant review because it would require this Court to determine the validity of the provisions of the release based on a hypothetical judgment which the court below found could only be made with reference to the facts of a particular case. The court of appeals found that whether a particular instance of noncompliance (assuming it were to occur) would give rise to a new claim for relief not barred by the release or would constitute a failure to remedy continued effects of past discrimination would depend on the circumstances of the particular case (A. 59a).

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*Petitioners also ignore the fact that the decrees provide a mechanism for resolution of complaints which is available whether or not an employee has signed a release. Implementation Committees are established at each major plant. An industrywide Audit and Review ("A & R") Committee, composed of management, union and Government members, each constituency having equal voting power and authority, is charged with monitoring compliance with the decrees. Matters which the A & R Committee cannot resolve unanimously may be brought before the district court (A. 18a-19a).

By finding that it could not resolve such questions in a factual vacuum, the court of appeals did not leave "in doubt" a question of "critical importance" to this case or any "segment of American industry" (Harris Petition, p. 11). It merely followed the usual and prudent course of declining to render an advisory opinion which could not possibly take into account the varying situations which might arise in the future.

Third, the question whether a release of claims for injunctive relief against continued effects of pre-decree acts is invalid is, by the Harris petitioners' own concession, not properly before this Court or ripe for determination (Motion to Defer Consideration, ¶¶ 1-2). That question is not properly before the Court because (a) as the Fifth Circuit interpreted the original language of paragraph 18(g), the release did not include such claims (A. 57a-59a) and (b) the issue whether the release can include claims for injunctive relief from "continued effects" is presently before the district court and the court of appeals.* Since the issue may be mooted by developments below (Motion to Defer Consideration, ¶ 2) or may later be presented to this Court upon an appropriate record, review, if any, by this Court should await further action of the lower courts.**

Finally, contrary to petitioners' implication (Harris Petition, p. 9), denial of the petition will not substantially increase the volume of future litigation before the lower courts. Within the next three months the tender of back

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*See pp. 7-8, *supra*.

**Deferral, however, would only serve to keep the injunctive release question improperly before this Court. At some later time the Harris petitioners may develop a suitable vehicle for review of the question presented. If they succeed, a new petition may be filed at the appropriate time. If they do not develop a suitable vehicle for review, no purpose would be served, two or three years hence, by breathing life into the present petition, which they concede is unsuitable (Motion to Defer Consideration, ¶¶ 1-2, 4).

pay to virtually all affected employees will have been completed. If this Court grants certiorari, employees who have accepted the back pay and signed the release will, if anything, be encouraged to sue for more relief in the hope that the release may be found invalid. Moreover, if the writ is granted and it is held that a release of accrued claims, causally rooted in acts prior to a consent decree, knowingly and voluntarily executed in exchange for valuable consideration, could not validly bar future suits by dissatisfied releasors on the same Title VII claim, litigation would be generated that would occupy the federal courts for years to come.* The Fifth Circuit aptly described the consequences of such a holding:

> "Very frankly, we cannot conceive of how any employment discrimination dispute could ever be resolved outside, or indeed inside, the courtroom, if defendants were forbidden to obtain binding, negotiated settlements. No defendant would ever deliver money, promises, or any other consideration—not even a peppercorn—except after entry of a contested, final court order, and even this, on appellants' reasoning, might not end the matter. The EEOC and judicial caseloads would swell to chaotic dimensions. . . . Such a doctrine is unheard of." (A. 69a-70a)

B. There Is No Conflict of Decision.

Petitioners' central argument with respect to the release is bottomed on a laboriously constructed but nonexistent conflict between the decision below and this Court's

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*As is pointed out at pp. 15-17, *infra*, the release here in question is substantially similar in scope and effect to releases executed by thousands of claimants in other Title VII litigation.

decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). Beginning with the assumption that it "will not be known for several years" and is now "a matter of conjecture" (Harris Petition, pp. 8, 11), whether the decrees will eliminate the continued effects of past discrimination and whether the defendants will comply with the decrees, petitioners argue that the releases contemplated by Decree I will require employees to waive "prospective" rights contrary to *Gardner-Denver**.

The court of appeals disposed of the asserted conflict as an "attempt to obfuscate the issues by mixing several distinct ideas, including election of remedies, prospective waiver, liquidated as opposed to unliquidated damages, and congressional policies underlying different statutes" (A. 65a-66a).

Gardner-Denver dealt with the doctrine of election of remedies, which has no relevance to the present case. There, an employee submitted a claim to arbitration under a collective bargaining agreement and the arbitrator found that he was discharged for just cause. In the employee's subsequent Title VII action claiming the discharge was racially motivated, the employer argued that the employee, by submitting his claim to arbitration, was precluded from suing under Title VII. 415 U. S. at 43. This Court held that resort to arbitration to enforce contractual rights did not, under the election of remedies doctrine, preclude a subsequent suit, *id.* at 49-50, since the remedies under Title VII were intended to be "parallel or overlapping" and "submission of a claim to one forum does not preclude a later submission to another". *Id.* at 47-48.

**Gardner-Denver* is the sole case relied upon by petitioners in support of their assertion that the holding below was erroneous; they cite no conflicts of decisions among the courts of appeal.

Justice Powell was careful to distinguish, however, between a waiver by election of remedies (resort to a parallel forum) and the ordinary release of a cause of action:

> "Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. . . .
>
> * * *
>
> "In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52 & n. 15.

Petitioners continue their "attempt to obfuscate" by equating the principle of election of remedies with a voluntary and knowing release of a cause of action. They argue that:

> "The waiver in *Alexander* was prospective in that, *although the disputed employer conduct* occurred *before the purported waiver,* the employee committed himself in advance to obtaining only so much relief as the arbitration would thereafter award." (Harris Petition at 13) (emphasis added).

There was *no* "waiver" in *Gardner-Denver.* The fact that the employee "committed himself in advance" to the arbitral forum was explicitly distinguished from a voluntary and knowing release of a cause of action for good consideration. If there had been a release of the cause of action in

Gardner-Denver pursuant to a voluntary settlement, it would have been valid under the principles stated therein, although the basis of the claim released would still have been "disputed employer conduct [which] occurred before the . . . waiver".

The release in this case does not involve "a waiver in advance of a controversy" (A. 63a). Here,

> "[A]ll the ingredients of controversy to be compromised under [the release provision] have their operative and legally consequential origin in acts, patterns, and practices which were performed by the defendants up to and including April 12, 1974 [the date of the consent decrees]. Those operative ingredients are thus antecedent to any possible compromise, *not prospective.*" (A. 63a-64a) (emphasis added).

Gardner-Denver, therefore, directly supports the holding of the court below. This Court stated that a waiver of an employee's "cause of action" under Title VII pursuant to a voluntary settlement expressly conditioned upon such waiver would be valid if voluntary and knowing. The companies seek no more in the instant case. For those employees who elect to accept the offer of back pay, the release accomplishes no more than a waiver of the possibility of bringing an independent suit for additional relief based on claims under Title VII and related discrimination laws arising from acts performed on or before April 12, 1974. If an employee has an accrued cause of action based on alleged prior discrimination, he can sue for damages or injunctive relief for both past and continued effects of the challenged acts. There is no reason why he should not be given the option to settle and release that cause of action in its entirety.

Accordingly, the district court and the Fifth Circuit did not err in finding no conflict with *Gardner-Denver* (A. 11a, 69a).

C. The Decision Below Is Clearly Correct.

The claims to be released pursuant to paragraph 18(g) of Decree I are only those arising from conduct, acts or practices "occurring on or before the date of entry of this Decree" (A. 55a). The release required by Decree I is similar to other releases commonly used under Title VII. Petitioners' argument, if accepted, would nullify the congressional selection of "[c]ooperation and voluntary compliance" as the "preferred means" for resolving employment discrimination disputes, *Gardner-Denver, supra,* 415 U. S. at 44 (A. 44a), and wholly or partially invalidate releases signed by thousands of individuals in other proceedings.

When the EEOC succeeds in a conciliation effort under § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), and obtains a conciliation agreement with the employer to which the charging party becomes a party by acceptance of the agreement and the benefits thereof, the EEOC customarily inserts a "Waiver and Release, Conditional upon Performance" clause in the agreement, of which the following is typical:

> "The Charging Party deems this Agreement to be fair and equitable, and hereby waives, releases and covenants not to sue the Respondent with respect to any matters which *were or might have been alleged* as charges filed with the [EEOC] subject to performance by the Respondent of the promises and representations contained herein. . . ." (A. 70a & n. 37) (emphasis added).

That release expressly bars suit upon all matters which *were* or *might have been* alleged as charges. It clearly encompasses and thereby bars a later suit for additional relief

based on the same claim. As the court of appeals stated, to find such a release invalid would be "contrary to the policies and procedures that heretofore have been followed in employment discrimination cases" and would deprive the employee of the chance to make a choice, not otherwise available, which "does not cost the employee a wink" (A. 70a).

The Fifth Circuit also noted (A. 55 n. 30) that the instant release provision was patterned after the release utilized in the nationwide Bell System consent decree, *EEOC* v. *American Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd in part, appeal dismissed in part,* 506 F.2d 735 (3d Cir. 1974), which provided as follows:

> "The Bell Companies may require that acceptance by any person of individual relief pursuant to the terms of Part A, Section III [back pay relief], shall constitute a waiver and release by such person of *any* claims for alleged violations of Title VII . . . , 42 U.S.C. §§ 1981, 1983, Executive Order 11246, or any applicable state fair employment practice laws or regulations *based upon occurrences prior to the date of this Agreement and the Decree. . . .*" 1 CCH Emp. Prac. Guide ¶ 1860.15 (1973) (emphasis added).

The Bell System release covers any claims "based upon occurrences prior to" the date of the agreement and decree, including claims for additional relief allegedly due as a result of continued effects of the same prior occurence (A. 55a n. 30).

The simple truth of the matter is that such releases are commonplace in Title VII litigation* and, indeed, in almost all litigation. They cannot be read to waive any prospective

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**See, e.g., United States* v. *Georgia Power Co.*, No. 12355 at 14 (N.D. Ga., Jan. 31, 1974) ("Amended and Final Decree" incorporated release covering violations of Title VII and related laws which have occurred "prior to" the entry of the decree), cited at A. 71a

rights, and the decision below approving such a release is correct.

II.

THE DENIAL OF INTERVENTION TO NOW DOES NOT WARRANT REVIEW BY CERTIORARI.

The district court denied intervention under Rule 24(a)(1), Fed. R. Civ. P., to NOW *qua* organization on the ground that NOW was not a "person aggrieved" within the meaning of § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). It denied intervention under Rule 24(a)(2) on the ground that NOW had not demonstrated inadequacy of representation or a sufficient interest in the subject matter of the action (A. 5a*). NOW appealed from that denial, urging that it had an "absolute, unconditional right of intervention" *qua* organization (A. 32a). The Fifth Circuit deferred consideration of the question whether NOW was a "person aggrieved" under Section 706(f)(1) in favor of an approach "more directly dispositive" (A. 33a-34a). It noted that the Government's complaint was filed under Section 707, 42 U.S.C. § 2000e-6, and held that:

> "Nothing in § 707 or in any other federal statute conferred an unconditional right of intervention upon any private individual or association thereof." (A. 35a).

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n. 38; *Bryan* v. *Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974), *cert. denied*, 419 U.S. 900 (1975) (on delivery of settlement checks, "all defendants shall be released of and from any and all obligations, claims, demands, and causes of action" which any class member may have against them); *Hecht* v. *Cooperative for American Relief Everywhere, Inc.*, 6 F.E.P. Cases 1075 (S.D.N.Y. 1973); *cf.*, *American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 572 (D. Md. 1974); *Partee* v. *Pic-Walsh Freight Co.*, 7 F.E.P. Cases 1315 (W.D. Tenn. 1972); *Meat Cutters* v. *Safeway Stores, Inc.*, 6 F. E. P. Cases 14 (D. Ka. 1972).

*References, for consistency, are to the appendix to the Harris Petition.

Although the Fifth Circuit considered the matter "mostly ended" with its holding that NOW had no statutory right of intervention under Rule 24(a)(1), (A. 39a), it further held that the district court did not err in denying intervention to NOW under Rule 24(a)(2) or (b). (A. 39a-42a) The Fifth Circuit accordingly dismissed NOW's appeal *qua* organization for want of jurisdiction (A. 29a, 42a).

NOW argues that Section 707(e) incorporates all Section 706 procedures into actions brought pursuant to Section 707, including a statutory right to intervene after a pattern or practice suit has been filed by the Government (NOW Petition, p. 6). The legislative history, however, supports the Fifth Circuit's determination that Congress did not intend to incorporate anything other than the administrative procedures of Section 706 into actions under Section 707*.

In reaching the conclusion that no statutory right of intervention exists, the court of appeals reviewed exhaustively that legislative history, the language of the statute and the decisions cited by NOW (A. 32a-39a). It noted that Section 707 was intended to provide the Government with a "swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals" (A. 35a). It also noted that it was influenced by the "strong judicial policy against nonexpress private intervention in government enforcement litigation when an adequate private remedy is freely accessible" (A. 37a). This Court has been similarly reluctant to imply a right of

*The House Committee on Education and Labor described Section 707(e) as a measure which "[a]ssimilate[d] procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the Commission may provide an *administrative procedure* to be the counterpart of the present Section 707 action" (A. 36a-37a at n.19, emphasis added).

intervention under a statute which gives a private party an independent right of action. *See Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).

On the facts before it, the court of appeals' affirmance of the denial of intervention to NOW, *qua* organization, under Rule 24(a)(2), was also clearly correct and does not merit review. The court found that entry of the decrees did not "operate to impair or impede the protection" of any interest NOW might have, because neither NOW nor its members are bound by the decrees and have "plenary legal remedies . . . fully available" (A. 39a-40a). Moreover, on the record, NOW had made "no colorable showing of inadequacy in the government's representation of the public interest" (A. 41a).

The court of appeals also held that NOW had shown no abuse of discretion in the district court's denial of permissive intervention under Rule 24(b) and that the district court was "clearly" justified in determining that "the interests of the majority of the affected individuals predominated over NOW's interest in further delaying implementation of the decrees' reforms" (A. 41a). Since certiorari is not granted "to review evidence and discuss specific facts", *United States* v. *Johnston,* 268 U.S. 220, 227 (1925), review of the conclusions of the court of appeals is inappropriate.

In addition, review is unjustified because NOW's interests were fully protected throughout the proceedings below by its participation through nominees and counsel (A. 41a). NOW filed an amended complaint in intervention on behalf of the three female petitioners permitted by the district court to intervene (A. 27a & n. 11). NOW filed "extensive briefs" before Judge Pointer "concerning the effects of the consent decrees upon the rights of females" (*id.*) and filed a brief and presented oral argument before

the Fifth Circuit on behalf of those three women (A. 28a). The fact is that NOW's interests are being represented by the three petitioners as "adequately" as NOW itself can represent those interests and that fact should foreclose any inquiry into the propriety of the lower court's application of Rule 24(a)(2).

The decisions cited by NOW, apparently in support of its claim under Rule 24(a)(2), are inapposite. The decision of this Court in *Trbovich* v. *UMW*, 404 U.S. 528 (1972), was adequately distinguished by the Fifth Circuit (A. 40a n. 21). In *Trbovich*, suit by the Government was the exclusive remedy under the statute involved; Title VII allows private suits. *Trbovich* is also distinguishable on the ground that NOW's interests were adequately represented in this proceeding by three female petitioners represented by counsel for NOW.

The other cases which NOW cites (Petition, p. 7) either *denied* intervention because of a failure to meet Rule 24(a)(2) requirements* or granted intervention because the petitioner showed substantial and direct interest which was affected by the action. Here there was no such showing that the requirements of Rule 24(a)(2) had been met.

III.

THIS COURT SHOULD NOT GRANT THE NOW PETITION TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN APPROVING THE CONSENT DECREES.

The NOW petitioners contend that the consent decrees are inadequate in that (1) they fail to correct alleged sys-

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*E.g., *Donaldson* v. *United States*, 400 U.S. 517 (1971). In that case, the Court affirmed a denial of intervention to a third party being investigated by the Internal Revenue Service in an action to enforce summonses for records of the third party's former employer. The Court held that, as petitioner had no proprietary or any other protectable interest such as privilege, he had no right of intervention under Rule 24(a)(2).

tematic discrimination in the 1940's, (2) they base goals for assignment to trade and craft jobs on units in which women are allegedly underrepresented, and (3) they fail to provide seniority carryover or rate retention for certain women. The NOW petitioners argue that for those reasons the district court erred in refusing to vacate the consent decrees (NOW Petition, pp. 8, 12).

The Fifth Circuit thoroughly rejected the NOW petitioners' claims in a manner that requires only brief summarization (A. 114a-117a). First, concerning the alleged exclusion of women in the 1940's, the barriers of limitations and laches are insurmountable. Even if such alleged discrimination occurred and even if those barriers could be surmounted, the result sought by the NOW petitioners would be to invalidate the decrees in their entirety, leaving no relief for those alleged victims of purported discrimination thirty years ago or the approximately 60,000 minority and female employees now receiving the benefits of the decrees.

Second, the NOW petitioners continue to "overlook" (A. 115a-116a n. 87) the specific provision in Decree I that 50 percent of all those promoted into trade and craft jobs shall be minority or female employees. As the number of females in production and maintenance positions rises*, the number of females in trade and craft jobs will correspondingly increase.

Third, the Fifth Circuit held there is no obligation to provide transfer rights across bargaining unit lines (with rate retention and seniority carryover) for "secretaries"

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*The number of females in production and maintenance positions must necessarily increase because Decree II requires that 20% of all new hires for such positions shall be females.

who might wish to become "rail straighteners" (A. 117a). In response to NOW's interpretation of a prior Fifth Circuit decision in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973), (upon which NOW relies in its Petition at 11), the Fifth Circuit stated:

> "We believe NOW places far too general a reliance on *BING*. Truck driving is essentially truck driving, though firms sometimes require more experience for 'road' positions. By contrast, secretarial work and rail straightening are, at least in obvious respects, quite different. . . . Accordingly, we assume from our common experience that clerical-technical-plant security and production-maintenance are basically unrelated occupations." (A. 117a)

Finally, the NOW petitioners ignore the fact that any woman who feels discriminated against either before or after the consent decrees is not barred by the decrees from filing a private action for injunctive relief. Any such woman who is offered back pay under the decrees is free to reject the tender and preserve whatever claims she may have.

The objections to the decrees raised by NOW are without merit. This Court should not grant a writ of certiorari to consider whether to vacate those decrees on the basis of such unfounded allegations.

Conclusion

For the foregoing reasons, the Harris and NOW Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix

Title VII of the Civil Rights Act of 1964, Section 707, *as amended*, 42 U.S.C. § 2000e-6 (Supp. III, 1973):

§ 2000e-6. *Civil actions by the Attorney General.*

(a) Complaint.

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single-judge district court: hearing, determination, expedition of action.

This [sic] district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opin-

ion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. (Pub. L. 88-352, title VII, § 707, July 2, 1964, 78 Stat. 261.)

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission.

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer.

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure.

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title. (As amended Pub. L. 92-261, § 5, Mar. 24, 1972, 86 Stat. 107.)